IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 531 of 1990

For Approval and Signature:

HONOURABLE MR.JUSTICE J.R.VORA
HONOURABLE MR.JUSTICE SHARAD D.DAVE

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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STATE OF GUJARAT
Versus
LUHAR PARBHABHAI GOVABHAI & ANR

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Appearance :
MR KC SHAH APP for Appellant
MR ADIL MEHTA for Opponents

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CORAM : HONOURABLE MR.JUSTICE J.R.VORA

and

HONOURABLE MR.JUSTICE SHARAD D.DAVE

Date : 07/11/2006

ORAL JUDGMENT : (Per : HONOURABLE MR.JUSTICE J.R.VORA)

1 This Appeal is preferred by the State under Section 378 of the Code of Criminal Procedure against the acquittal of present respondents by learned Additional Sessions Judge, Banaskantha, Palanpur, vide judgment and order dated 31st of March, 1990, delivered in Sessions Case No. 19 of 1988, whereby both the respondents - accused in the said Sessions Case came to be acquitted for the offences punishable under Section 17 to read Section 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985.

2 Brief facts reveal that Mr. R.M. Bhadoria, working as second PSI in Tharad Police Station, on 27th of August, 1987 at about 9.00 hours along with senior PSI Mr. K.G. Khant, Head Constable Shankarlal Kodaraj, Police Constable Bababhai Jivabhai and Police Constable Amratbhai Valjibhai, in government vehicle, were on patrolling and reached near Khoda Check-post at about 10.50 hours which is a border of Rajasthan and the State of Gujarat. All of them noticed that two persons who were coming from Sanchor town, on noticing the government vehicle, started escaping towards village Khoda. Police party with Bhadoria including Police Constable Chataraji Becharaji, Police Constable Aminkhan Inayatkhan and Police Constable Hamirji Heduji, belonged to Khoda Check-post, chased those two persons and they apprehended them. Both the persons thereafter were brought to Khoda Check-post and two panchas were called and search of persons was carried out in

presence of panchas . Accused No.1 stated his name to be Luhar Parbha Gova, resident of Piluda, Taluka Tharad. He was carrying the cotton bag in his right hand. The said bag was opened and one resin purse was found from the said bag. On opening of the said purse, substance of black colour was found. The said substance was smelled by panchas and all and it appeared to be opium. There was no permit with the accused – appellant No.1 for possessing such opium. The opium was in quantity of about 1 kg, amounting to Rs. 3,000/-. Out of the said substance, one piece of about 50 grams was separated and was placed in one plastic bag, which was then sealed and a slip containing the signature of PSI Bhadoria and panchas was also placed in that separated substance of 50 grams. The said sample was sealed by seal of PSI, Tharad. The remaining quantity of opium substance was also sealed and seized and a seal of PSI, Tharad, was put on the main quantity of opium. Some other articles like three photographs were also found from the bag. The cotton bag as well as purse were also seized by the police. The other person i.e. accused - appellant No. 2 stated his name to be Musla Alu Usmanbhai, resident of village Sangadvatr, Taluka Sanchor, District – Zalor. A panchnama was prepared from 11.00 hours to 12.00 hours and the statements of three Constables of the Check-post were recorded by Mr. Bhadoria on the spot. Police party thereafter came to Tharad from Khoda and a written complaint was given by Mr. Bhadoria, which is on record at Exhibit-25. It is the prosecution that after recording of the complaint, investigation was

handed over to Mr. Bhadoria and the then PSO Mr. Kantilal Punjiram, PW-5 handed over the seized muddamal to Writer Constable Kantilal Ramchand – PW-6. It appears that through the LCB, ultimately, the sample muddamal was reached to Forensic Science Laboratory on 11th of September, 1987 and was analysed on 16th of March, 1988 and it was found that the exhibit contained wall fragments of poppy capsule. After investigation and receiving report from Forensic Science Laboratory, Ahmedabad, a charge sheet came to be filed against both the respondents.

3 Learned Sessions Judge, Banaskantha at Palanpur, framed charges against both the respondents vide Exhibits 4 and 5 on 17th of December, 1988, to which both the respondents pleaded not guilty and, hence, the prosecution tendered evidence to prove its case.

4 The prosecution in all examined 10 witnesses and produced documentary evidence on record. PW-1 Exhibit-8 Shankarlal Kodaraj, who was Head Constable of Tharad Police Station and a member of police party, stated about the raid carried out and the muddamal recovered. PW-2 Alla Bachaya, Exhibit-9 and PW-3 Shravanbhai Rupabhai, Exhibit-11, are both panchas of the prosecution case for seizure of muddamal, but none of them supported the prosecution case. PW-4 Exhibit-13 Chataraji Becharaji, who was at the relevant time stationed as Police

Constable, Khoda Check-post, and participated in chasing the accused and seizing the muddamal from accused - respondent No.1 and he stated those facts in his deposition. PW-5 Kantilal Punjiram, Exhibit – 11, happened to be the Police Station Officer of Tharad Police Station on the relevant day and he registered the offence and the First Information Report given by Bhadoriya and he stated that he informed about the seizure of opium to the District Police Superintendent and two samples of the substance which were produced before him in sealed condition by Mr. Bhadoria, were delivered to Writer Head Constable for safe custody. The Writer Head Constable, who was one Mr. Kantilal Ramchand, PW-6, was examined at Exhibit -16 and he stated that he had received the said muddamal packets on that day from PSO and had made entries in the relevant Registers. He identified before the Court the said muddamal packets. The entries made in concerned Register was brought by him in the Court and a certified copy was produced by him at Exhibit – 17. PW-7 Popatji Bajuji, was at relevant juncture working as Constable and according to him, Writer Head Constable Kantilal i.e. PW-6, delivered him a sealed packet of muddamal article No.5 for onward transmission of the same to Palanpur LCB which he in-turn entrusted to LCB Head Constable Mr. Dasura. In relevant Registers, entries were made and certified copy of the same is produced vide Exhibit – 19. PW-8 Anwarkhan Akbarkhan Dasura is examined at Exhibit – 20 and he stated that as Police Head Constable of Local Crime Branch,

Palanpur, has received muddamal packet of this case from PW-7 Popatji Bajuji and he identified his signature. He received said muddamal along with a forwarding letter and he forwarded the forwarding letter and muddamal packet to Forensic Science Laboratory through Head Constable Vaghaji Motiji. He produced on record the certified copy of Register of Prohibition cases kept in LCB Police Station at Exhibit - 21. PW-9 Vaghaji Motiji was serving as Head Constable in LCB Branch of Palanpur and he stated that he received the muddamal packets and forwarding letter, to be delivered to Forensic Science Laboratory on 10th of September, 1987 and he delivered the muddamal as well as forwarding letter to Forensic Science Laboratory at Ahmedabad on 11th of September, 1987. Vide Exhibit – 23 he produced on record the receipt of the Forensic Science Laboratory about receiving of said muddamal packet as well as forwarding letter. He identified muddamal Article No.5 to be the said muddamal. PW-10 Raghuvirsingh Mahavirsinh Bhadoria. Exhibit-24, has been examined by the prosecution as Mr. Bhadoria being Complainant as well as Investigating Officer of the case. He stated that he along with the Police party, who were on patrolling and near Khoda Check-post at about 10.15 hours they noticed that two persons turned out to be the respondents thereafter started escaping from police on noticing the police vehicle and they were chased and apprehended and from respondent No.1 one cotton bag containing a resin bag opium of about 1kg in quantity was found. According to him, sample of about

50 gms. was taken out from the main quantity and both the samples were prepared and sealed by seal of PSI Tharad and thereafter he gave his complaint which was registered at Tharad Police Station and he handed over the muddamal to concerned Police Station Officer. This is all the oral evidence of the prosecution. Beside oral evidence and the documents referred to above, prosecution also produced on record First Information Report at Exhibit -25, result of Analysis of Forensic Science Laboratory at Exhibit – 27.

5 On prosecution case being over, both the respondents were examined by the Trial Court under Section 313 of the Code of Criminal Procedure. Denying the evidence of prosecution, respondent No.1 stated in his defence that his father-in-law was sick and he was returning to his house from village Dangar in one jeep car and was sitting in front. In the back of the jeep, 4 to 5 other persons were sitting and near Khoda border, police searched the jeep and he was arrested. Except that, he did not know anything. While respondent No.2 stated that he was coming from Dangar and was working with Pirji Darbar and he was coming to Jetda village for retrieving animals in jeep car and was sitting in the front. Police stopped the jeep near the check-post and he was arrested. Except that, he did not know anything.

6 After hearing learned counsels for both the sides, learned Trial Judge came to the conclusion that the prosecution

failed to prove the case against both the accused beyond reasonable doubt. Therefore, he acquitted both the respondents and, hence, this Appeal.

7 Learned APP Mr. K.C. Shah, vehemently assailing the judgment impugned in this Appeal, submitted that the learned Trial Judge took into consideration the suggestions made by the defence in the examination-in-cross and that cannot form an evidence to be appreciated. It was submitted that the conclusions arrived at by the learned Trial Judge rests on assumption and presumptions. There is no concrete evidence to support the conclusion of acquittal. There may be some omissions and variations in the evidence of witnesses as witnesses might be disposing before the court after considerable time, but the court has to look upon whether the prosecution was able to prove substratum of the case. It is submitted that there are three to four eye witnesses examined by the prosecution and they had no animosity or enmity against the accused persons so as to file a false case against them. Variation in the evidence of police witnesses here and there would not be a cause to create doubt in the case of prosecution, which ultimately would not affect the core of the prosecution case. The reasoning which the learned Trial Judge has given for the acquittal of respondents are not sustainable. Lastly the learned Trial Judge has relied upon minor discrepancies and the conduct of the accused. It is submitted that one cannot predict the human conduct that in

certain circumstances certain person would behave in certain manner. So far as discrepancies pointed out by learned Trial Judge in respect of the deposition of the witnesses with regard to local situation, it is submitted by learned APP that it depends upon the power of observation of each individual and thereby the substratum of the prosecution case would not be affected. It is submitted that merely because the panchas are turned hostile, it could not be said that the prosecution case becomes doubtful. It is the rule of law that if other evidence is found trustworthy, the same can be acted upon. It is, therefore, submitted that the Appeal be allowed and acquittal of the respondents be converted in conviction.

8 On the other hand, learned Advocate Mr. Adil Mehta for both the respondents has heavily relied upon the reasoning of the Trial Judge and the evidence of the prosecution case wherein material contradictions are pointed out. Supporting the judgment and order impugned, it is submitted by learned Advocate for the respondents that there is no reason to take a different view than the view taken by the learned Trial Judge as the circumstances in the case do not warrant the same. It is, therefore, submitted that Appeal deserves to be dismissed.

9 After hearing learned counsels for the parties and going through the record carefully, it must be remembered that

principles in dealing with the Appeal against the acquittal are well settled. Those principles are reiterated by the Apex Court in the case of DWARKADAS v. STATE OF HARYANA, as reported in (2002) 1 SCC 204 and in the matter of KANSHIRAM vs. STATE OF MADHYA PRADESH, as reported in AIR 2001 SC 2902. It is true that, the plenitude of the power available to this court hearing an appeal against acquittal is the same as that available to the court hearing an appeal against an order of conviction, but the High Court should not interfere with an order of acquittal only because different plausible views may arise on the evidence and the court may think that the view taken by the Trial Court of the evidence recorded was not correct. After careful scrutiny in acquittal appeals, the court must come to the conclusion that the view taken by the learned Trial Judge while acquitting cannot be the view of a reasonable and prudent person. On materials on record, the court examining the acquittal appeals, must examine the reasons on which the order of acquittal is based and must reach to the conclusion that the view taken by the Trial Judge for acquittal was clearly unreasonable, erroneous and could not have been taken in the facts and circumstances of the case. This is so because the principles that the accused is innocent till found guilty continues in acquittal appeals also. Ordinarily, the view taken by the Trial Court as to the credibility of the witnesses and the weight and consideration to be attached to the evidence of such witnesses must be given proper appreciation. Unless the court dealing with the appeals against the

acquittal reaches to a concrete conclusion that the reasons given by the Trial Judge for the acquittal are not at all tenable, then and then only, the order of acquittal should be interfered with and not lightly or merely because some other view is possible. Sound logic after exercising careful scrutiny of overall circumstances of the case is required to dislodge the reasoning of acquittal.

10 Coming to the appreciation and the conclusion of the Trial Judge in this case, it appears that the Trial Judge found inconsistency in the evidence of the prosecution witnesses, which ultimately resulted in creating doubt in the mind of Trial Court. It must be noted that though the case of the prosecution cannot be thrown out only because panch witnesses have not supported the prosecution case. The evidence of the police witnesses and the credibility to be attached to concerned witnesses, is also an important aspect of appreciation of evidence. Despite some of the witnesses might not have supported the prosecution case, if the court finds that the prosecution case is worth believing relying upon the remaining witnesses, conviction of the respondents can be based upon such evidence. It all depends upon the facts and circumstances of each individual case. Like wise, in the present case, though the panchas have not supported the prosecution case the evidence of the remaining witnesses has been appreciated carefully by the Trial Judge for creditworthiness. Therefore precisely the question before us is whether exercise undertaken by

the Trial Court is sustainable.

11 We have carefully scanned through the evidence recorded by the Trial Judge, reasoning given for the conclusions and we have also gone through the reasonable and broad probabilities of the case. When we dispassionately and independently appreciated the evidence on record, we found that there are material contradictions in the prosecution case between the evidence of police witnesses of prosecution. The Trial Judge has noted those contradictions and came to the conclusion that those contradictions go to the root of the prosecution case. It is found that so far as respondent No.2 is concerned, only allegation by the prosecution against him is that, he participated in running along with respondent No.1. Except this, nothing is admittedly alleged against the respondent No.2. Respondent No. 2 is joined as accused in this case by virtue of Section 29 of the Criminal Procedure Code. We also do not find any other manifestation in the evidence of prosecution as to hold that the respondent No.2 is liable for abatement and criminal conspiracy as envisaged by Section 29 of the said Act. Therefore, so far as respondent No.2 is concerned, he is rightly acquitted by the learned Trial Judge.

12 As against respondent No.1, as aforesaid, when we have gone through the evidence and the conclusions, it is found that there are contradictions in the evidence of prosecution. So far as the oral evidence is concerned, some of the witnesses

stated that the accused No.1 was searched where both the accused were apprehended while admittedly some of the witnesses stated that both the accused were brought at Khoda Check-post and searched. This is a material contradiction. This is so because consequently this fact affects the probability of an incident to have occurred as alleged by the prosecution. True that, the witnesses of the prosecution may vary on certain aspects as it is not expected from the witnesses to depose stereotype version and some variation is bound to be there in each prosecution case, but the fact that where both the accused were searched and muddamal was seized, which is material and important aspect of the prosecution case and contradiction on this aspect amongst the witnesses creates doubt in the prosecution case. True that, one cannot predict the human behaviour, but at the same time, what may be probable by the measures of prudent person, is also material aspect, to be considered while appreciating the evidence in criminal trial. As it appears from the evidence, the accused were at some distance, when they noticed the police vehicle, they started running. The question, therefore, would arise that if any contraband article was in possession of any of the accused it might have been thrown by the accused before they were apprehended by the police. This issue is considered by the Trial Judge on touchstone of probability and we are not inclined to differ from the reasoning of the trial judge given by him in his judgment in respect of not only contradiction in prosecution

evidence, but on probability of the events alleged to have been taken place according to the prosecution case. Very important aspect is in respect of sealing of muddamal. Admittedly, in uncertain terms, PSO Exhibit - 14 Kantilal and complainant Bhadoria stated in their depositions that both the sample muddamal packets were sealed by seal of “PSI Tharad”. When Exhibit – 27 Forensic Science Laboratory report is seen, it is found that the seal was of “P.S.I., Tharad, P.S.T., B.K.” Therefore, the main lapse on the part of the prosecution case remains in the region of sealing of muddamals. Admittedly, muddamal was seized on 27th August, 1987 and was handed over to Writer - Head Constable on the same day through PSO, however, this muddamal was received by the Forensic Science Laboratory on 11th of September, 1987. In fact, these muddamals were in the custody of Writer - Head Constable upto 11th of September, 1987. That itself may not be a vital circumstance, but if all the circumstances are taken together, i.e. contradictions in the evidence of police witnesses, contradictions in respect of seizure of muddamal articles and delay in sending the same to the Forensic Science Laboratory, they make big dent in the prosecution case. Over and above, necessary it is to state that the learned Trial Judge also relied upon one more very important fact i.e. report of the Forensic Science Laboratory, Exhibit – 27. Admittedly, all the prosecution witnesses, except panchas, stated before the court that both the packets which were prepared on the spot and sealed by PSI, Tharad, and a slip in both the packets signed by both the

panchas and PSI, Tharad, was put under those packets. When we take into consideration Exhibit - 27 i.e. report of the Forensic Science Laboratory, there is no reference of the slip, stated to have been signed by both the panchas and PSI Bhadoria. It is celebrated principle of law that the appreciation made by the Trial Judge about the credibility of the witnesses and the weight and consideration to be attached to the evidence, the Trial Court is the best judge. Unless something is shown perverse in the method of appreciation by the Trial Judge, the reasoning and conclusions cannot lightly be interfered with. This is so because the learned Trial Judge has an opportunity to observe the demeanour of the witnesses and to appreciate his evidence along with the performance of a particular witness.

13 In this view of the matter, we do not find the judgment and order impugned exceptionable and for the reasons aforesaid, this Appeal stands dismissed. Bail bonds stands cancelled.

(J. R. VORA, J.)

(S. D. DAVE, J.)

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